IN THE

Supreme Court of the United States

No. 1011

October Term, 1945.

JOHN P. HUDOCK, Executor of the Estate of Michael G. Hudock, Deceased,

Petitioner,

v.

WILLIAM C. FREEMAN, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Pennsylvania Liberty Bank and Trust Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, AND BRIEF IN SUPPORT THEREOF.

ROBERT T. MCCRACKEN,
GEORGE G. CHANDLER,
1421 Chestnut Street,
Philadelphia 2, Penna.,
FRANK L. PINOLA,
Miners Nat. Bank Building,
Wilkes-Barre, Penna.,
Counsel for Petitioner.

International, 236 Chestnut St., Phila. 6, Pa

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled matter on January 7, 1946 (R. 51-55), which judgment affirmed the judgment of the Court of Common Pleas of Luzerne County, Pennsylvania, in favor of the respondent and against the petitioner in the sum of $2,132.42 with interest from October 30, 1941 (R. 43-46); and shows to this Honorable Court:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

The present action at law was brought by the respondent to recover a stock assessment levied against your petitioner as a shareholder of Pennsylvania Liberty Bank and Trust Company (R. 6-29).

On and before January 13, 1930, Pennsylvania Bank and Trust Company was a solvent state bank, incorporated under the Pennsylvania Act of May 13, 1876, P. L. 161 (7 PS 71) with a capital stock of $200,000., divided into 2000 shares of the par value of $100.00 each (R. 6-8). It possessed trust powers under the Pennsylvania Act of July 17, 1919, P. L. 1032 (R. 8). Its shareholders were individually responsible for its debts to the amount of the par value of their stock in addition to the par value of the shares, because Section 5 of the 1876 Act provided

> "The shareholders of any corporation formed under this act shall be individually responsible, equally and ratably, but not one for the other, for all contracts, debts and engagements of such corporation to the amount of their stock therein at the par value thereof in addition to the par value of such shares."

On and before January 13, 1930, Liberty State Bank and Trust Company was a solvent title insurance and trust company, incorporated under the Pennsylvania Act of April 29, 1874, P. L. 73, and its amendments and supplements (15 PS 1) with a capital stock of $250,000., divided into 5000 shares of the par value of $50.00 each (R. 9-11). It acquired banking powers by taking over the dissolved The Liberty State Bank of Wilkes-Barre, Pa., and by accepting the provisions of the Pennsylvania Act of May 9, 1889, P. L. 159 and its amendments and supplements, including the Act of May 9, 1923, P. L. 173 (R. 10-12). Its shareholders were not individually responsible for its debts, because Section 24 of the 1874 Act provided

> "That the officers and stockholders of corporations organized under or accepting the provisions of this act shall not be individually liable for the debts of said corporation otherwise than in this (sic) provided."

On January 13, 1930, Pennsylvania Bank and Trust Company and Liberty State Bank and Trust Company con-

solidated into Pennsylvania Liberty Bank and Trust Company in pursuance of the Pennsylvania Act of May 3, 1909, P L. 408 (15 PS 421) with a capital stock of $325,000., divided into 13,000 shares of a par value of $25.00 each (R. 14-15). Section 3 of the 1909 Act (15 PS 421) provides in pertinent part:

> "Upon the filing of said certificate and agreement . . . and upon the issuing of new Letters Patent . . . the said merger shall be deemed to have taken place, and the said corporations to be one corporation under the name adopted in and by said agreement, possessing all the rights, privileges and franchises theretofore vested in each of them; . . . provided that all rights of creditors and all liens upon the property of each of said corporations shall continue unimpaired, limited in lien to the property affected by such liens at the time of the creation of the same, and the respective constituent corporations may be deemed to be in existence to preserve the same; and all debts not of record, duties, and liabilities of each of said constituent corporations shall thenceforth attach to the said new corporation, and may be enforced against it to the same extent and by the same process as if said debts, duties and liabilities had been contracted by it."

Pursuant to the consolidation agreement 8000 shares were exchanged and distributed to the shareholders of Pennsylvania Bank and Trust Company in the proportion of four shares of new stock for one share of old stock, and 5000 shares were exchanged and distributed to the shareholders of Liberty State Bank and Trust Company in the proportion of one share of new stock for one share of old stock (R. 15). Your petitioner is the holder of 125 shares of stock of the Pennsylvania Liberty Bank and Trust Company received in exchange for 125 shares of Liberty State Bank and Trust Company (R. 29).

From and after January 13, 1930 and until September 21, 1931, Pennsylvania Liberty Bank and Trust Company conducted the business of banking as well as that of a title insurance and trust company (R. 15-16). On September 21, 1931 the Secretary of Banking of the Commonwealth of Pennsylvania took possession of the business and property of Pennsylvania Liberty Bank and Trust Company and thereafter determined to liquidate its affairs (R. 16-17). On January 9, 1937 an assessment of $325,000., at the rate of $25.00 per share, being the full par value of each share, was levied upon all the shareholders of Pennsylvania Liberty Bank and Trust Company (R. 17-18). Your petitioner was duly notified of an assessment in the sum of $3125.00 upon his 125 shares of stock (R. 18).

On March 20, 1944 the Supreme Court of Pennsylvania in the suit of William C. Freeman, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of *Pennsylvania Liberty Bank and Trust Company, v. Joseph M. Hiznay and Victor Lee Dodson to No. 183,* January Term, 1943, reported in 349 Pennsylvania State Reports pages 89 et seq., reduced the aggregate amount of the stock assessment from $325,000. to $200,000., and determined that all the shareholders were liable therefor at the rate of $15.3846 per share (R. 18-19). On this revised basis the stock assessment upon the 125 shares held by your petitioner was reduced to $1923.07 (R. 29).

Upon the failure of your petitioner to pay the stock assessment, the present assumpsit action for its recovery was instituted on November 23, 1942 (R. 1). The primary defense of your petitioner to that action was that the levying and collection of such an assessment from your petitioner and those other shareholders of the Pennsylvania Liberty Bank and Trust Company, who had previously been shareholders of the Liberty State Bank and Trust Company and who under Section 24 of the 1874 Act were not subject to individual liability for its corporate debts, was without legislative authority and in violation of the 14th Amendment

to the Constitution of the United States (R. 30-39). In making absolute a rule for judgment against your petitioner for want of a sufficient affidavit of defense, the trial court concluded that it was bound by the previous decision of the Supreme Court of Pennsylvania in the case of **Freeman etc., v. Hiznay et al.**, 349 Pa. 89 (1944) upholding the validity of the assessment. It also ruled that the contention that the stock assessment deprived your petitioner and those other former shareholders of the constituent Liberty State Bank and Trust Company of their property without due process in violation of the 14th Amendment to the Constitution of the United States was an argument to be presented only to an appellate court (R. 43-45).

On appeal to the Supreme Court of Pennsylvania the judgment against your petitioner was affirmed in an opinion by Mr. Justice Horace Stern, dated January 7, 1946, and reported in **353 Pa. 345, 1946** (R. 51-56). That opinion reaffirmed the **Hiznay** case with the correction that the power of the new consolidated corporation to carry on the business of banking, which power the **Hiznay** case (349 Pa. 89, 96) had erroneously stated came only from the constituent Pennsylvania Bank and Trust Company, was actually derived from both constituent corporations, that is from the Pennsylvania Bank and Trust Company by reason of the Act of May 13, 1876, P. L. 161, and also from the Liberty State Bank and Trust Company by reason of the Act of May 9, 1923, P. L. 173 (R. 53). Mr. Justice Stern held that your petitioner could not successfully contend that he had been unduly deprived of a property right or denied the equal protection of the laws because he had entered of his own accord into a corporate organization (i. e., Pennsylvania Liberty Bank and Trust Company) and thereby knew or under the law was bound to know he had assumed a stockholder's liability from which he had been previously absolved as a shareholder of Liberty State Bank and Trust Company (R. 54).

II. STATEMENT DISCLOSING BASIS OF JURISDICTION TO REVEW.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 344).

The Pennsylvania statutes involved are the following:

(a) Section 24 of the Act of April 29, 1874, P. L. 73, which absolves shareholders of a Pennsylvania title insurance and trust company from individual responsibility for its debts and is quoted at page 2, ante;

(b) Section 5 of the Act of May 13, 1876, P. L. 161, which imposes a personal responsibility upon shareholders of a Pennsylvania bank for its debts and is quoted at page 2, ante; and

(c) Section 3 of the Consolidation Act of May 3, 1909, P. L. 408, which provides that the rights, privileges and franchises of the constituent corporations are vested in the consolidated corporation and further provides that all rights of creditors and all liens upon the property of each constituent corporation shall continue unimpaired after consolidation, and that the constituent corporations may be deemed to be in existence to preserve the same, and which is quoted at page 3, ante.

The judgment sought to be reviewed was rendered on January 7, 1946 by the Supreme Court of Pennsylvania and is reported in **353 Pa. 345 (1946)**.

On March 15, 1945 a final judgment in the sum of $2563.17 with interest was entered against your petitioner in the Court of Common Pleas of Luzerne County, Pennsylvania (R. 48). The entry of that final judgment was assigned as error on appeal to the Supreme Court of Pennsylvania (R. 49). On January 7, 1946 the Supreme Court of Pennsylvania affirmed the judgment in an opinion by Mr. Justice Stern (R. 1, 55) which did not remand the case

for further proceedings in the trial Court. Upon the expiration of the ten day period allowed for the filing of a petition for reargument, the Supreme Court of Pennsylvania issued on January 18, 1946 a remittitur to the Prothonotary of the Court of Common Pleas of Luzerne County, who on January 24, 1946 acknowledged the receipt and filing of the remittitur and record (R. 1). The judgment of affirmance of the Supreme Court of Pennsylvania is final and is therefore the one reviewable under Section 237 (b) of the Judicial Code.

The federal question was timely and properly raised and pressed at every stage of the proceedings before the Courts of Pennsylvania. Paragraphs 18 (c), (d) and (e), 22 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j) and (k), 24 (b), 28 (a) of your petitioner's affidavit of defense as defendant in the court below (R. 31-38) plead a violation of the 14th Amendment to the Constitution of the United States by the levying and collection of a stock assessment against your petitioner as a shareholder in the constituent Liberty State Bank and Trust Company. The decision of the trial court ruled that this federal question should be presented to an appellate court and not to the trial court (R. 44-45). The opinion of the Supreme Court of Pennsylvania considered the question of the violation of the 14th Amendment through the levy and collection of the stock assessment and concluded that your petitioner had not been unduly deprived of a property right or denied the equal protection of the laws in violation of the 14th Amendment (R. 54).

III. QUESTIONS PRESENTED.

1. Is the statutory exemption of shareholders of a Pennsylvania title insurance and trust company (i. e., Liberty State Bank and Trust Company) from personal liability for its debts a valuable property right which may not be impaired or destroyed without legislative authority and

which lies within the protection of the 14th Amendment to the Constitution of the United States?

2. Was the levying and collection of a stock assessment from those shareholders of the consolidated Pennsylvania Liberty Bank and Trust Company, who prior to the consolidation had been shareholders of the constituent Liberty State Bank and Trust Company and as such were free of individual liability, violative of the 14th Amendment because of the absence of any Pennsylvania statute imposing personal liability upon the shareholders of a new corporation resulting from the consolidation of a solvent Pennsylvania state bank and a solvent Pennsylvania title insurance and trust company?

3. Are the shareholders of the constituent title insurance and trust company estopped from setting up their statutory freedom from liability for a stock assessment because they voluntarily assented to the consolidation of their constituent corporation with a state bank, the shareholders of which are individually responsible for the latter's debts?

4. Did the legal existence of the constituent corporations continue after the consolidation for the settlement of their respective liabilities?

IV. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The federal question of substance, which the Supreme Court of Pennsylvania has decided in a way probably not in accord with applicable decisions of this Court, is the right to levy and collect a stock assessment against a shareholder who by statute is free from individual responsibility for corporate debts. The gravamen of your petitioner's complaint is that he has been deprived of a valuable property right in violation of the 14th Amendment to the Constitution of the United States.

The Supreme Court of Pennsylvania seeks to justify this deprivation as a practical solution of a perplexing legal

problem. It challenges the right of your petitioner to complain that he has been unjustly deprived of a valuable property right and has been denied the equal protection of the laws upon the ground that he is now barred from raising this federal question through his voluntary entry, as a constituent shareholder, into a corporate consolidation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of your Honorable Court, directed to the Supreme Court of Pennsylvania, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case numbered and entitled on its Docket No. 141, January Term, 1945, William C. Freeman, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of *Pennsylvania Liberty Bank and Trust Company v. John P. Hudock,* Executor of the Estate of Michael G. Hudock, Deceased, appellant, and that said judgment of the Supreme Court of Pennsylvania may be reversed and that your petitioner may have such other and further relief in the premises as to your Honorable Court may seem meet and just.

And your petitioner will ever pray.

ROBERT T. MCCRACKEN,
GEORGE G. CHANDLER,
FRANK L. PINOLA,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A. Summary of Argument.

The primary legal issue raised by the present petition is whether or not the statutory freedom from personal liability for corporate debts which the shareholders of the constituent Liberty State Bank and Trust Company enjoyed at the time of the consolidation was destroyed by the voluntary consolidation of that title insurance and trust company with the Pennsylvania Bank and Trust Company, a state bank. If, as your petitioner maintains, the consolidation did not destroy or impair that valuable property right, then there can be no legal basis for the conclusion of the Supreme Court of Pennsylvania that your petitioner is now precluded from raising the federal question that his constitutional rights under the 14th Amendment have been impaired.

In order to establish that your petitioner did not knowingly and voluntarily assume a personal liability from which he had been previously absolved, when he entered of his own accord into a corporate consolidation between a solvent Pennsylvania title insurance and trust company with banking powers and a solvent Pennsylvania state bank with trust powers, this brief will first review the statutory and decision law of Pennsylvania governing the relative rights and liabilities of the constituent shareholders in the consolidated bank and trust company. That review will show the failure of the Supreme Court of Pennsylvania to recognize and apply certain controlling principles of the Pennsylvania law of corporate consolidation as well as its misapplication of certain other legal principles, sound in themselves but inapplicable to the particular facts and circumstances of the present case.

Having thus shown that your petitioner's freedom from individual responsibility for corporate debts survived the consolidation, this brief will set forth the several reasons why your petitioner has been deprived of a valuable property right and denied the equal protection of the laws in violation of the 14th Amendment.

B. The Supreme Court of Pennsylvania misapplied the statutory and decision law governing the relative rights and liabilities of constituent shareholders in a consolidated corporation.

The opinion by Mr. Justice Stern in the present case (353 Pa. 345; R. 51-55) and his opinion in the earlier case of **Freeman, etc. v. Hiznay, et al.**, 349 Pa. 89 (1944), are so inextricably interwoven that they actually form but a single decision upon the same subject matter. A full consideration of the later case requires a complete examination into the earlier case. For this reason the two interdependent opinions will be referred to and discussed in this brief.

The controlling principles of corporate law, which the Supreme Court of Pennsylvania correctly stated but misapplied, are (1) that at the time of the consolidation the shareholders of the constituent Pennsylvania Bank and Trust Company were individually responsible for its debts in the aggregate amount of $200,000. because of Section 5 of the Act of May 13, 1876, P. L. 161 (7 PS 71) under which that Bank was incorporated (349 Pa. 89, 92; 353 Pa. 345, 347, R. 52); (2) that the shareholders of Liberty State Bank and Trust Company were not individually responsible for its debts by reason of Section 24 of the Act of April 29, 1874, P. L. 73 (15 PS 1) under which that Title Insurance and Trust Company was organized (349 Pa. 89, 93; 353 Pa. 345, 347, R. 52); (3) that it was the general intendment of the Consolidation Act of May 3, 1909, P. L. 408 (15 PS 421) and of the Pennsylvania decisions dealing with the consolidation of corporations that "a consolidation does

not work any change in the assets, rights and liabilities of the constituent corporations or in the status of creditors and shareholders" (349 Pa. 89, 95); (4) that the statutory liability of the shareholders of the constituent Pennsylvania Bank and Trust Company, imposed by the 1876 Act and aggregating $200,000. at the time of the consolidation, continued for the benefit of the creditors of the consolidated corporation (349 Pa. 89, 95; 353 Pa. 345, 348, R. 52); and (5) that the consolidation could neither impair nor increase the total amount of that liability (349 Pa. 89, 95).

What perplexed the Supreme Court of Pennsylvania and led to its misapplication of the foregoing legal principles was whether the $200,000. statutory liability imposed by the 1876 Act should be wholly borne by the holders of the 8000 shares of the consolidated Pennsylvania Liberty Bank and Trust Company which were exchanged for their $200,000. of capital stock of the constituent Pennsylvania Bank and Trust Company, or whether it should be distributed equally and ratably among all of the holders of the 13,000 shares of the consolidated corporation (i. e., the 8000 shares distributed to the shareholders of the constituent Pennsylvania Bank and Trust Company and the 5000 shares exchanged for the stock of the constituent Liberty State Bank and Trust Company) (349 Pa. 89, 94). The Supreme Court of Pennsylvania concluded that this perplexing problem did not lend itself to solution by the application of any particular rules of logic but called rather for an answer dictated by practical consideration so far as consistent with legal principles (349 Pa. 89, 94).

After observing that the two constituent corporations are deemed to be dissolved and to lose their identity in the new consolidated corporate entity, and that it would be impracticable if not impossible to distinguish the 13,000 shares of the consolidated bank and trust company one from another, the Supreme Court of Pennsylvania decided that the $200,000. statutory liability should be divided equally and ratably among all of the holders of the 13,000

shares of the consolidated corporation because the latter's power to carry on a banking business after the consolidation was derived solely from the constituent Pennsylvania Bank and Trust Company by reason of the Act of 1876 (349 Pa. 89, 94-97).

There are several prejudicial errors underlying this unjust and improper result. First, it is violative of the legal principle that a consolidation under the law of Pennsylvania does not work any change in the rights and liabilities of the constituent corporations or in the status of their creditors and shareholders. The $200,000. statutory liability of the shareholders of the constituent Pennsylvania Bank and Trust Company has been changed and shifted so that their burden has been proportionately decreased and a new and heretofore non-existent liability has been imposed upon the shareholders of the constituent Liberty State Bank and Trust Company in derogation of their prior immunity. This change and shift in liabilities has materially altered the respective status of the two groups of constituent shareholders.

Second, the status of creditors has likewise been materially altered. Heretofore they looked only to the shareholders of the constituent Pennsylvania Bank and Trust Company for a stock assessment in satisfaction of their claims. Now they must look to a new group of shareholders for partial satisfaction of their claims, even though that group may not be as financially responsible as the original group.

Thirdly, the Supreme Court of Pennsylvania overlooked the statutory and decision law of Pennsylvania that the two constituent corporations continue in existence after the consolidation for the settlement of liabilities which are not merged and remain separate and apart. Section 3 of the Consolidation Act of May 3, 1909, P. L. 408 (15 PS 421) contains the proviso that "all rights of creditors . . . shall continue unimpaired . . . and the respective con-

stituent corporations may be deemed to be in existence to preserve the same." In the case of

FIDELITY & CASUALTY CO. v. AMERICAN SURETY CO., 313 Pa. 145 (1933)

the Supreme Court of Pennsylvania recognized that under Section 3 of the 1909 Consolidation Act the rights of creditors of the separate constituent corporations did not merge but remained apart and unimpaired. Chief Justice Frazer stated (p. 149):

> "Before the consolidation the Commonwealth stood in the position of a creditor of each original bank, with 'a sovereign right of priority over all other creditors'. After the merger, it remained a preferred creditor, with the right to pursue the property of each constituent corporation to the extent of its liability. The obligations of the sureties were fixed by their separate contracts before the merger and could be neither increased nor diminished by the agreement of consolidation to which they were not parties. As stated by the court below: '*While the merger generally worked the extinction of the corporate existence of each of the antecedent constituent banks, we think the legal existence of each constituent bank was in effect continued for settlement of liabilities as provided by the act of assembly . . .*' The obligations to the Commonwealth remained separate and distinct and there were consequently no merger of liability upon the part of the sureties giving right to cosuretyship." (Italics supplied.)

That the rights of creditors of the constituent corporations do not merge but remain separate after consolidation, and that the legal existence of each constituent corporation is continued for the settlement of liabilities, was also laid down and applied in the cases of **Mortgage B. & L. Assn.**, 334 Pa. 81 (1939), at pages 91-92 and **Electric Co. v. Transit Co.**, 258 Pa. 447 (1917). Both Mr. Justice Stern and counsel

for the Pennsylvania Banking Department recognized this limited survival of the constituent corporations, when in the **Hiznay** case (349 Pa. 89, 95) they refused to increase the individual liability of the shareholders of the consolidated corporation from $200,000., the aggregate par value of the capital stock of the constituent Pennsylvania Bank and Trust Company, to $325,000., the aggregate par value of the capital stock of the new consolidated corporation.

Fourthly, it is neither impracticable nor impossible to distinguish the 13,000 shares of the consolidated Pennsylvania Liberty Bank and Trust Company and to allocate the same between the respective shareholders of the two constituent corporations. The stock ledgers and transfer books should show to whom and in what amounts the 8,000 shares were issued and distributed in exchange for the 2,000 shares of the constituent Pennsylvania Bank and Trust Company and the 5,000 shares issued and distributed in exchange for the 5,000 shares of the constituent Liberty State Bank and Trust Company, and any subsequent changes in stock ownership. The consolidated corporation continued in active business from January 13, 1930, to September 21, 1931. The record does not disclose whether or not this stock was actively traded in during this short interval of time. In view of the then current business depression, the probability is that the other stockholders, like your petitioner, held on to their stock.

Finally, there is no basis at law or in equity for the equal and ratable division of the $200,000. statutory liability among all of the holders of the 13,000 shares of the consolidated corporation. The 1909 Consolidation Act does not impose or purport to impose any individual responsibility upon the shareholders which had not been in existence at the time of the consolidation. The Supreme Court of Pennsylvania has declared that it is the general intendment of the Consolidation Act and of the decisions thereunder that the consolidation does not effect any change in

the rights and liabilities of the constituent corporations or in the status of their creditors and shareholders. It would be unfair and inequitable to impair and destroy the freedom from individual responsibility of the shareholders of the constituent Liberty State Bank and Trust Company, who gained nothing by the consolidation because their constituent company already possessed full banking powers before the consolidation. As pointed out by the Supreme Court of Pennsylvania in the **Hiznay** case (349 Pa. 89, 93) this freedom from liability was not affected by the subsequent grant of banking powers to the constituent title insurance and trust company, which still remained a title insurance and trust company and did not become a banking institution subject to the provisions of the Banking Act of May 13, 1876, P. L. 161 (7 PS 71) when it acquired banking powers under the enabling Act of May 9, 1889, P. L. 159 and its amendments and supplements, including the Act of May 9, 1923, P. L. 173. See **Gordon v. Winneberger,** 310 Pa. 362 (1932) at pages 370-74.

The Supreme Court of Pennsylvania in the present case (353 Pa. 345, 348; R. 53) corrected the prior erroneous statement made in the **Hiznay** case (349 Pa. 89, 93) to the effect that the power of the new consolidated corporation to carry on the business of banking was derived solely from the constituent Pennsylvania Bank and Trust Company by reason of the Act of 1876, and admitted that this power was jointly derived from both constituent companies by reason of the Banking Act of 1876, under which the constituent Pennsylvania Bank and Trust Company was organized, and the enabling Act of May 9, 1889, P. L. 159 and its amendments and supplements, including the Act of May 9, 1923, P. L. 173 which enlarged the rights and powers of title insurance and trust companies in Pennsylvania and granted them full banking powers provided they, like the constituent Liberty State Bank and Trust Company, had accepted the provisions of such enabling legislation after their incorporation under the Act of 1874. In an effort to explain away the damaging

effect of this admission and to justify the impairment and destruction of the freedom from individual responsibility previously enjoyed by the shareholders of the constituent Liberty State Bank and Trust Company, the Supreme Court of Pennsylvania (353 Pa. 345, 348-49; R. 53-54) argues that the business of the consolidated corporation was carried on by all the shareholders acting under the two Acts of 1874 and 1876 jointly and for their combined benefit and that, therefore, all the shareholders inherited indiscriminately and in common all the rights granted by both statutes subject to the liabilities and restrictions imposed by both statutes. Such an argument contravenes the statutory and decision law of Pennsylvania that the consolidation did not alter the rights and liabilities of the constituent corporations or the status of their creditors and shareholders. If this argument be sound, then the Supreme Court of Pennsylvania as well as counsel for the State Banking Department were in error when they agreed in the **Hixnay** case (349 Pa. 89, 95) that the $200,000. of liability could under no circumstance be increased to $325,000. If the shareholders of the constituent Liberty State Bank and Trust Company could exercise full banking powers before consolidation without individual responsibility for corporate debts, and if such banking powers survived and were not impaired by the consolidation, certainly they cannot be impaired and made subservient to the co-existent banking powers derived from the other constituent corporation.

Your petitioner does not dispute the statutory and decision law of Pennsylvania that the double liability of the shareholders of the constituent Pennsylvania Bank and Trust Company continued unimpaired after the consolidation. He does object, however, to the changing of that liability by the Pennsylvania Supreme Court through enlarging the group of shareholders, thereby cutting down the liability of the shareholders of the constituent Pennsylvania Bank and Trust Company and placing a portion of their liability upon the shareholders of the constituent Liberty

State Bank and Trust Company without legislative authority and without any resultant benefit or gain to those shareholders who have previously enjoyed freedom from individual responsibility. If any such change is to be made in the law of Pennsylvania, it should be effected by legislation and not by judicial fiat.

C. The imposition of personal liability upon the shareholders of the constituent title insurance and trust company constitutes a taking of property without due process of law and a denial of the equal protection of the law in violation of the 14th Amendment to the Constitution of the United States.

At no stage of the present proceedings has it been contended that the statutory exemption from personal liability for corporate debts was not a valuable property right entitled to full protection under the 14th Amendment. Mr. Justice Linn in **Gordon v. Winneberger**, 310 Pa. 362 (1932), referring to the immunity of shareholders in a title insurance and trust company under Section 24 of the Act of April 29, 1874, P. L. 73 (15 PS 1) even though the company, as here, had acquired banking powers under the Act of May 9, 1923, P. L. 173, said (pp. 367, 370-71, 373):

> "The general rule is that a shareholder's liability for corporate debts is limited to the amount he agreed to contribute to the capital stock. Enlarged liability is the exception; it possesses elements of a penalty. Section 24 shows that the legislature was not content to rest the stockholders' obligation on the implications of the general rule and, therefore, specifically expressed the immunity. *It is a valuable privilege. A legislative intention to withdraw it should clearly appear before the courts may declare it withdrawn.* In O'Reilly v. Bard, 105 Pa. 569, 573, we said: 'Corporation stockholders, who have already contributed their proportions to the capital stock, are not at the common law,

or in equity, liable for corporate debts; statutes which impose this liability must therefore be strictly construed; this rule of law is well settled: Mean's App. 85 Pa. 78.' . . .

• • •

"Is defendant liable under section 5 of the Banking Act of 1876? It is clear that in the general acts providing, on the one hand, for the formation of corporations with the powers specified in section 2, clause 9 and section 29 of the general corporation act, and supplements, and, on the other hand, for banks of discount and deposit under the Act of 1876, *the legislature kept separate and apart the classes of corporations to be formed under each.* Article XVI, section 11, of the Constitution, required that banking corporations be kept in a separate class. . . .

"In our decisions referring to the subject, we have necessarily observed and adhered to the classification so established. The separation has been maintained with all its implications although the corporations receive deposits of money, and (in the last case) also discounted paper. . . .

• • •

"Unless, therefore, such trust companies be transferred from the class of title insurance companies, formed under the Corporation Act of 1874, to 'the class to which banking institutions belong', the immunity created by Section 24, supra, cannot be displaced by the claim of enlarged liability imposed by section 5. *If such change in classification, with the resulting burden, should be made, it must be made by the legislature, not by the court.* If the change had been intended by the statutes granting additional powers to companies formed under the Corporation Act of 1874, the legislature would have used appropriate words to declare the intention; in the absence of such declaration, we must conclude that the change was not intended." (Italics supplied.)

The decision of the Supreme Court of Pennsylvania in both the present case (353 Pa. 345, 1946) and the **Hizmay** case (349 Pa. 89, 1944) necessarily results in taking the money to be paid by your petitioner and the other shareholders in the constituent Liberty State Bank and Trust Company under the stock assessment and giving it not only to the creditors of the new consolidated corporation and of the constituent Pennsylvania Bank and Trust Company, but also to the creditors of the constituent Liberty State Bank and Trust Company from whom he and they were expressly immunized by the Act of 1874. This judicial action clearly violates the due process of law of the 14th Amendment.

The **Winneberger** case, supra, also holds that a bank incorporated under the Pennsylvania Act of May 13, 1876, P. L. 161 (7 PS 71) may never acquire title insurance powers even though it has been granted trust powers under the Pennsylvania Act of July 17, 1919, P. L. 32. The power of the consolidated corporation to conduct the business of a title insurance company, as it actually did, was consequently derived solely from the constituent Liberty State Bank and Trust Company.

The imposition and collection of a stock assessment upon the shareholders of the Liberty State Bank and Trust Company is a violation of the equal protection of the law afforded by the 14th Amendment in that they are denied the immunity granted under Section 24 of the 1874 Act. In other words, shareholders of those title insurance companies, which have not merged with banks organized and operating under the Act of 1876, receive the benefit of the immunity expressly provided by Section 24; whereas those shareholders, like your petitioner, whose title insurance company joined with a bank incorporated under the Act of 1876 are deprived of this express statutory protection. This unequal treatment is forbidden by the 14th Amendment.

D. The shareholders of the constituent title insurance and trust company are not barred from claiming their statutory exemption from individual responsibility by their assent to the consolidation.

There is no factual or legal basis for the statement by the Supreme Court of Pennsylvania that your petitioner knew or under the law was bound to know that he had assumed a personal liability from which he had been previously absolved when he entered, of his own accord, into the consolidation (353 Pa. 345, 349; R. 54). The Consolidation Act of May 3, 1909, P. L. 408 (15 PS 421) does not impose, expressly or by necessary implication, any individual responsibility upon the stockholders of the consolidated corporation. On the contrary, Section 3 of that Act expressly provides that all rights and privileges shall continue and vest in the consolidated corporation and preserves without change the status of creditors and shareholders. The Courts of Pennsylvania have likewise held that consolidation works no change in the rights and liabilities of the constituent corporations or in the status of creditors and shareholders. Patently, there was nothing to put your petitioner and the other shareholders in the constituent Liberty State Bank and Trust Company on notice that they were assuming a new liability and abandoning their prior immunity.

Both constituent corporations were solvent at the time of their consolidation. The creditors of both accepted the consolidated corporation as their debtor and continued to transact business with it. There could be no possible misleading of creditors to their damage to justify an estoppel against the shareholders of the constituent title insurance and trust company.

Prior to the decision of the Supreme Court of Pennsylvania in the **Hiznay** case (349 Pa. 89, 1944) there had been no reported case in Pennsylvania involving the relative rights and liabilities of shareholders in a new corporation arising from the consolidation of a solvent state bank with trust powers and a solvent title insurance and trust company

with banking powers. The first time that the Legislature of Pennsylvania expressly continued the liabilities of shareholders in merging or consolidating corporations was the Act of May 5, 1933, P. L. 364 (15 PS 2852-907), which Act postdates the January 13, 1930 consolidation in the present case. Under these circumstances it cannot be stated as a matter of fact or law that your petitioner knew or was bound to know that he was surrendering his immunity from individual responsibility when he assented to the consolidation.

It has been heretofore pointed out (pp. 2, 17-18 ante) that the constituent Liberty State Bank and Trust Company possessed full banking powers in addition to its original grant of the powers of a title insurance and trust company. Mr. Justice Stern admits in his second opinion (353 Pa. 345, 348; R. 53) that the power of the new consolidated corporation to carry on the business of banking was derived from both constituent corporations. Your petitioner and the other shareholders of the constituent Liberty State Bank and Trust Company did not, therefore, receive any additional benefit from the consolidation which they had not previously enjoyed. An estoppel may not be raised against them on the basis of benefits received, as Mr. Justice Stern attempted to do in his first opinion (349 Pa. 89) but frankly admitted was erroneous in his second opinion (353 Pa. 345, 348; R. 53).

It is significant that it stands admitted that if the Secretary of Banking had applied all of the assets received by the new consolidated bank from the constituent Pennsylvania Bank and Trust Company in payment of the depositors of that constituent, they would have been paid in full (R. 37-38). It is also conceded by the Secretary of Banking that if the assets on hand on January 9, 1937 (the date of the levy of the stock assessment), which had been received from the constituent Pennsylvania Bank and Trust Company had been applied to the payment of the depositors of that constituent, they would have been paid in full (R. 38). Had the assets been so applied, there would be no

creditors of the constituent Pennsylvania Bank and Trust Company for whose protection any assessment would have been necessary. Under these circumstances it might well be argued that an estoppel would lie against the Secretary of Banking for his failure to act in the protection of that group of creditors for whose benefit a stock assessment could alone be levied and collected.

In closing it should be noted that the present petition for certiorari does not ask this Court to reverse the construction placed upon the statutory law of Pennsylvania by the Supreme Court of Pennsylvania. What it seeks is a reversal based upon the failure of the Supreme Court of Pennsylvania to apply to the particular facts of the present case the controlling principles of statutory and decision law regarding the consolidation of corporations and the relative rights and liabilities of their shareholders.

E. Conclusion.

For the reasons above stated, it is respectfully submitted that the present case is one calling for the exercise by this Court of its supervisory powers over a federal question of substance and it is therefore respectfully requested that a writ of certiorari should be granted to review the decision of the Supreme Court of Pennsylvania in the present case, and finally to reverse it.

Respectfully submitted,

ROBERT T. MCCRACKEN,
GEORGE G. CHANDLER,
FRANK L. PINOLA,
Counsel for Petitioner.

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In the

Supreme Court of the United States

No. 1011

OCTOBER TERM, 1945

JOHN P. HUDOCK, Executor of the Estate of Michael G. Hudock, Deceased,
Petitioner,

v.

WILLIAM C. FREEMAN, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Pennsylvania Liberty Bank and Trust Company,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

JAMES H. DUFF,
Attorney General of Pennsylvania,
JOHN W. LORD, JR.,
Special Deputy Attorney General,
LEO W. WHITE,
Special Counsel for Closed Banks
Gazette Building,
37 Broad Street,
Pittston, Pennsylvania,
Counsel for Respondent

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa
Kenneth L. Morgan, Luzerne County Representative, Wilkes-Barre, Pa.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1945. No. 1011

John P. Hudock, Executor of the Estate of Michael G. Hudock, Deceased,

Petitioner,

v.

William C. Freeman, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Pennsylvania Liberty Bank and Trust Company

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent respectfully submits this brief in opposition to the petition for *certiorari* herein on behalf of John P. Hudock, Executor of the Estate of Michael G. Hudock, Deceased, petitioner.

REASONS FOR REFUSING THE WRIT

No Reviewable Federal Question of Substance is Presented

The Supreme Court of Pennsylvania in *Bell, Secretary of Banking v. Cabalik*, 346 Pa. 115 (1943), decided that the merger, under the Pennsylvania Consolidation Act of May 3, 1909, P. L. 408, of two banks, both formed under the Act of May 13, 1876, P. L. 161, as amended, did not absolve the shareholders of the resultant banking corporation from the individual liability imposed upon them by Section 5 of the Act of 1876, as follows:

> "The shareholders of any corporation formed under this act shall be individually responsible, equally and ratably, but not one for the other, for all contracts, debts, and engagements of such corporation to the amount of their stock therein, at the par value thereof, in addition to the par value of such shares."

There, as here, the unsuccessful defendant sought a review by the Supreme Court of the United States on the ground of alleged conflict with the 14th Amendment to the Federal Constitution. There, as here, the case did not present a federal question of substance and a writ of certiorari was denied: 318 U. S. 785, 87 L. Ed. 1152.

The Supreme Court of Pennsylvania has twice determined that all the stockholders of the closed Pennsyl-

vania Liberty Bank and Trust Company are liable for assessment: *Freeman, Secretary of Banking v. Hiznay, et al.*, 349 Pa. 84 (1944), and the case at bar, *Freeman, Secretary of Banking, v. Hudock, Executor*, 353 Pa. 345 (1946), in each of which the opinion was written by Mr. Justice Horace Stern. In the latter case the Justice specifically points out that his decisions rest upon a construction of the applicable Pennsylvania statutes (R. 52-53):

> "We have carefully considered the argument of appellant's counsel, amounting in effect to a reargument of the Hiznay case, but see no reason to change the conclusion there reached. We find nothing in the Consolidation Act of May 3, 1909, P. L. 408, to indicate an intention on the part of the legislature that the statutory liability of the shareholders, in the aggregate amount existing before the consolidation, should not be continued for the benefit of the creditors of the consolidated corporation. In Bell, Secretary of Banking v. Cabalik, 346 Pa. 115, 209 A. 2d 678, we specifically held that notwithstanding a consolidation of banking corporations under the Act of 1909 the statutory liability of the shareholders imposed by the Act of 1876 continued.
>
> "The more difficult problem considered in the Hiznay case was whether this statutory liability of $200,000 should be divided equally among all shareholders of the new corporation, or whether the latter should be separated into two classes, one made up of those who obtained their stock in exchange for that held by them in the bank and the other of those who obtained their stock in exchange for that held by them in the title insurance company. In deciding that the

liability should be prorated equally among all the shareholders, we did not, as appellant contends, usurp a legislative function nor rest our decision merely upon a practical basis that appeared to be just and equitable, but we construed the Consolidation Act of 1909 to intend that result."

It is a well established principle of law that courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state, and the mere fact that a state court may have rendered an erroneous decision on a question of state law, does not give rise to a claim under the 14th Amendment of the United States Constitution: *Brinkerhoff-Farris Trust & Savings Company, Petitioner v. Walter O. Hill, Treasurer, etc.*, 281 U. S. 673, 74 L. Ed. 1107, 1113.

The Supreme Court of the United States is bound by the construction given to a state statute by the highest court of the state as though the meaning so fixed had been expressed in the statute in specific words: *Guaranty Trust Company of New York, as Executor of the Last Will and Testament of Harriet D. Sewell, Deceased, Appt. v. William H. Blodgett, Tax Commissioner*, 287 U. S. 509-513, 72 L. Ed. 463.

The above principle applies to the instant case and demonstrates beyond peradventure that any alleged federal question here presented lacks substance and cannot be reviewed. The Supreme Court of Pennsylvania had every right to construe the applicable Pennsylvania statutes as authorizing the stock assessment upon all share-

holders of the consolidated bank.[1] Its decision, even though it be a misconstruction (or as petitioner says, a misapplication—B. 12, 13) of the law, presents no reviewable federal question: *King v. West Virginia*, 216 U. S. 92, 54 L. Ed. 396. Assuming, though not conceding, it could be shown that the decision of the Supreme Court of Pennsylvania, in the case at bar, is in conflict with or overrules prior pronouncements of the same Court in the cases cited here in petitioner's brief, nevertheless, the decision is not reviewable here for there is no constitutional right to have all general propositions of law, once adopted, remain unchanged: *Patterson v. Colorado*, 205 U. S. 454, 51 L. Ed. 879.

CONCLUSION

We believe, in view of the foregoing, that petitioner's rights were fairly and finally determined in the Court below, that he is not entitled, by law, to be again heard,

[1] The doctrine that there should be no stockholders' double liability unless a statute establishes it is not absolute: Anderson, Receiver, v. Abbot, Admx. c. t. a. etc., 321 U. S. 349, 88 L. Ed. 793 (1944) in which, upon principles of law other than statutory, the Supreme Court of the United States imposed assessment liability upon the shareholders of a holding company owning stock of a closed national bank, without distinction between those who purchased stock of the holding company for cash and those who acquired its stock in exchange for shares of the Bank. Together they shared the benefits of stock ownership by the holding company of the subsidiary national bank, including control.

in this Court, and that his petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES H. DUFF,
Attorney General of Pennsylvania,

JOHN W. LORD, JR.,
Special Deputy Attorney General,

LEO W. WHITE,
Special Counsel for Closed Banks,
Counsel for Respondent.

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IN THE

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No. 1011.

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ROBERT T. McCRACKEN,
GEORGE G. CHANDLER,
1421 Chestnut Street,
Philadelphia 2, Pa.,
FRANK L. PINOLA,
Miners Nat. Bank Building,
Wilkes-Barre, Pa.,
Counsel for Petitioner.

International, 236 Chestnut St., Phila. 6, Pa.

IN THE

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The respondent's brief in opposition to the petition for certiorari cites the Pennsylvania case of *Bell, Secretary of Banking v. Cabalik,* 346 Pa. 115 (1943), in which case a writ of certiorari was denied in *318 U. S. 785,* as an authority for the contention that the present case does not present a federal question of substance.

The *Cabalik* case is to be distinguished on its facts and law from the present case. The two constituent corporations in the *Cabalik* case were Pennsylvania state banks, incorporated under the Pennsylvania Act of May 13, 1876, P. L. 161 (7 PS 71). The respective shareholders of both constituent banks were individually responsible for corporate debts under Section 5 of the 1876 Act. The Supreme Court of Pennsylvania held in *346 Pa. 115* that the shareholders of the resultant corporation were not absolved from their respective individual liabilities in the absence of an express provision to the contrary in the Pennsylvania Act of May 3, 1909, P. L. 408 (15 PS 421), under which Act

the two constituent corporations had consolidated, or in the agreement of consolidation.

An entirely different factual and legal situation is found in the present case. Here, one constituent corporation was a state bank with its shareholders admittedly personally responsible for corporate debts, while the other constituent corporation was a Pennsylvania title insurance and trust company, the shareholders of which were by statute free from personal liability for corporate debts. The Supreme Court of Pennsylvania held in the two cases of **Freeman etc., v. Hiznay et al.**, 349 Pa. 89 (1944) and **Freeman etc. v. Hudock**, 353 Pa. 345 (1946) that the statutory immunity from personal liability for corporate debts, which the shareholders of the constituent title insurance and trust company enjoyed at the time of the consolidation, was destroyed by the voluntary consolidation with the constituent state bank, and that the existing stockholders' liability of the constituent state bank should be pro-rated between the respective shareholders of the constituent state bank and the constituent title insurance and trust company.

The primary legal issue raised by the *Cabalik* case was whether or not the shareholders of the two constituent corporations were absolved from their respective individual liabilities by the consolidation, particularly in view of the fact that neither the 1909 Consolidation Act nor the agreement of merger provided for such absolution. That issue is wholly different from the one raised by the present petition, namely, may the statutory immunity of shareholders of the constituent Pennsylvania title insurance and trust company be taken away by judicial fiat, and, in lieu thereof, may those shareholders be saddled with a proportionate part of the prior existing statutory liability of the shareholders of the other constituent corporation. In the *Cabalik* case the continuance of an existing liability did not constitute a taking of property without due process of law or a denial of the equal protection of the law in violation of the 14th Amendment to the Constitution of the United States;

whereas in the present case the imposition of personal liability upon the theretofore immune shareholders of the constituent title insurance and trust company necessarily resulted in a taking of property without due process of law and a denial of the equal protection of the law.

The right of a State court to interpret and declare the written and unwritten laws of its State and the binding effect of such interpretation are not absolute, but are subject to the provisions of the 14th Amendment to the Constitution of the United States. Where, as here, the Supreme Court of Pennsylvania has construed the applicable Pennsylvania statutes in a manner depriving your petitioner of a valuable property right without due process of law and denying your petitioner the equal protection of the law, a federal question of substance is presented. Otherwise, the protection of the 14th Amendment is a constitutional right of little or no value and would countenance the destruction of a valuable property right at the will of the State.

Respectfully submitted,

Robert T. McCracken,
George G. Chandler,
Frank L. Pinola,
Counsel for Petitioner.